No. 97-1509

(3)

FILED

APR 23 1998

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, AND
GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-VS-

PARIS HOYT CARRIGER,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners stand by the statement of the case set forth in the petition for writ of certiorari. Contrary to Carriger's implication, Petitioners' statement of the facts is not solely dependent upon the trial testimony of Robert Dunbar. It is overwhelmingly supported by the physical and circumstantial evidence. The "facts" set forth by Carriger, obtained verbatim from the majority opinion, contorts the trial evidence by interspersing either subsequent "testimony" by Carriger (at a state post-conviction relief hearing) or merely Carriger's purported theories in an attempt to explain away the evidence establishing his guilt. (Brief in Opposition (B.I.O.) at 1-8) It is a "hopelessly one-sided review of the record" (Appendix B at 17), viewing all of the evidence through a subjective Carriger-colored prism.

REASONS FOR GRANTING THE WRIT

Carriger claims that the en banc decision below is not worthy of certiorari review because it does not conflict with the law of other federal or state courts, does not announce a novel or important rule of federal law, and does not err in its application of the law. Nothing could be further from the truth. As pointed out in the petition for writ of certiorari, the majority below: (1) effectively eviscerated the 28 U.S.C. § 2254(d) presumption of correctness in the Ninth Circuit by refusing to apply it to a trial judge's finding of witness "credibility"; (2) lowered and misapplied the *Schlup*[1] "actual innocence" standard; and (3) held, contrary to every other federal circuit, that, pursuant to *Brady*,[2] a prosecutor must obtain from government agencies *not involved* in the investigation or prosecution of the case potential impeachment evidence *known to the defense*, and hand it over to the defense. Petitioners will briefly respond to the arguments made by Carriger on each issue.[3]

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1. *Schlup v. Delo*, 513 U.S. 298 (1995).

2. *Brady v. Maryland*, 373 U.S. 83 (1963).

3. Carriger also asks that, if certiorari is granted, the Court also review whether the en banc majority properly applied this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993). However, Carriger failed to file a cross-petition for writ of certiorari and, therefore, that issue is not before the Court. *See* Rule 13.4, Rules of the Supreme Court. Moreover, while Petitioners agree that the majority misapplied *Herrera*, it did so to the benefit of Carriger. (See Petition for Writ of Certiorari at 22 n.7)

I

THE MAJORITY REFUSED TO APPLY THE 28 U.S.C. § 2254(D) PRESUMPTION OF CORRECTNESS TO THE STATE COURT JUDGE'S DETERMINATION OF THE CREDIBILITY OF A WITNESS THE JUDGE PERSONALLY HEARD AND OBSERVED TESTIFY.

Carriger attempts to justify the majority's refusal to apply the 28 U.S.C. § 2254(d) presumption of correctness to the determination of witness "credibility" by utilizing the same methodology employed by the majority in its opinion—attempting to compartmentalize and explain away each individual piece of evidence establishing his guilt by drawing inferences most favorable to Carriger. (B.I.O. at 12–17) This methodology directly conflicts with well-established law. *E.g.*, *Parke v. Raley*, 506 U.S. 20, 35–36 (1992) (federal court must defer to state court on all inferences reasonably drawn from the record); *Marshall v. Lonberger*, 459 U.S. 422, 432–35 (1983) (before rejecting a state court's factual determination, a federal court "must conclude that the state court's findings lacked even 'fair support' in the record, including inferences fairly deducible" from the record). But it is not even necessary to engage in any sort of prolonged review of the record to realize the fallacy of the majority's refusal to apply the 28 U.S.C. § 2254(d) presumption of correctness. The issue is simple—may a federal court disregard a state court judge's determination of the "credibility" of a witness who testified before the state court judge and not the federal court. That is the nut of the issue, and the answer is obvious.

Carriger also attempts to minimize the state trial judge's credibility determination by stating that he "did not hear the trial testimony" and did not base his credibility determination on "Dunbar's demeanor," but on his "analysis of the physical evidence, and Dunbar's motives to lie." (B.I.O. at 12–13) However, Judge Ryan saw and heard Dunbar testify on three different occasions during the course of the post-conviction relief proceeding—when he confirmed his trial testimony, when he recanted his trial testimony, *and* when he recanted his recantation and confirmed his trial testimony. While Judge Ryan took the trouble to explain, in detail, how Dunbar's recantation was "inconsistent with the physical evidence, testimony of other trial witnesses, and his prior testimony" (Appendix D at 3), and that he had a myriad of motives to recant (*id.*), this rejection of the short-lived recantation was based, in large part, on his evaluation of Dunbar's demeanor on the witness stand. (*See Id.* at 2–3, 5)

Carriger, as did the majority below, makes much of the fact that Dunbar's short-lived recantation of his trial testimony "was given without immunity of any kind." (B.I.O. at 12 n 4; see also Appendix A at 30) But

this necessarily renders the recantation *less* reliable. At trial, and when he recanted his recantation at the post-conviction relief hearing, Dunbar was given testimonial immunity; he had admitted that he controlled stolen property (the jewelry). Dunbar did *not* request or obtain any sort of immunity when he recanted because *he knew he was lying* when he said that he and his ex-wife committed the robbery and murder. If, on the other hand, he had been telling the truth, he would have demanded immunity, or would not have so testified.

Carriger, as did the majority, ignores the fact that Dunbar's recantation is inherently incredible because it cannot be believed, unless one believes that Dunbar's ex-wife (*not* Carriger) committed the robbery and murder *with* Dunbar. (See Appendix B at 10–11) And, everybody, Carriger included, agrees that this part of Dunbar's recantation is not believable. (See Appendix B at 10)

No matter how one views the state court record, it is patently clear that the majority below stripped away the presumption of correctness due the state court judge's credibility determination in violation of 28 U.S.C. § 2254(d) and this Court's well-established caselaw. No federal circuit court, to Petitioners' knowledge, has done so before. This Court should grant certiorari review to bring the Ninth Circuit back in line with the rest of the federal judiciary.

II

THE MAJORITY WATERED-DOWN AND MISAPPLIED THE *SCHLUP* ACTUAL INNOCENCE STANDARD, AND IGNORED THE "RELIABILITY" REQUIREMENT.

Carriger erroneously asserts that Petitioners have argued that the *Schlup* actual innocence standard "is the same as the *Herrera* standard." Not so. In fact, Petitioners set forth in detail the *Schlup* standard, pointing out where and how the majority misapplied that standard. (Petition for Writ of Certiorari (P.W.C.) at 14–24) Petitioners did point out that the majority also misapplied the *Herrera* standard, effectively lowering the *Herrera* standard to the *Schlup* standard, and the *Schlup* standard to a *Strickland*[4]-type "confidence in the verdict" standard. (P.W.C. at 22 n.7)

Carriger also claims that Petitioners, and the dissent below, are incorrect in maintaining that the majority "adopted Dunbar's confession as the truth" for purposes of conducting a *Schlup* analysis. (B.I.O. at 11) Neither Petitioners nor the dissent asserted that the majority accepted the recantation as "the truth." Rather, both criticized the majority for accepting

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4. *Strickland v. Washington*, 466 U.S. 668 (1984).

and giving *any weight* to the recantation in light of Judge Ryan's finding that the recantation was "clearly incredible" (Appendix D at 3). (See Appendix B at 14; P.W.C. at 13) And, the majority most certainly considered and gave weight to Dunbar's recantation in conducting its flawed *Schlup* analysis: "We therefore *consider* Dunbar's confession as at least some evidence supporting Carriger's claims." "*Considering* Dunbar's confession along with the other evidence, which points as directly to Dunbar as to Carriger, we conclude that Carriger has met the *Schlup* standard." (Appendix A at 30, 36, emphasis added) Moreover, at oral argument before the en banc court, Carriger's counsel acknowledged that Dunbar's recantation was "critical" to the *Schlup* claim:

> COURT: Was there evidence from which a trier of fact could find that Carriger was guilty?
>
> MS. YOUNG: No there wasn't. When you look at the way our law defines innocence, and our law—
>
> COURT: The caveat though when you answer that way, the caveat is: Not if Dunbar recants his testimony. Don't you have to add that before you say what you just said?
>
> MS. YOUNG: *Do we need the fact that he took the stand and said I lied at trial? Yes, I think that's critical.*

(Appendix I[5] at 2, emphasis added) Had the majority properly applied the 28 U.S.C. § 2254(d) presumption of correctness to Judge Ryan's credibility determination, it could give "no weight" to Dunbar's short-lived recantation. *See Battle v. Delo*, 64 F.3d 347, 352–53 (8th Cir. 1995) (state court judge's finding that witness' claim that he was the "real killer" was "incredible" binds federal court pursuant to 28 U.S.C. § 2254(d) and that testimony is entitled to "no weight" in conducting a *Schlup* analysis.)

Carriger also claims that the majority did not misapply the *Schlup* standard because it mouthed the words "It is more likely than not that no reasonable juror hearing all of the now-available evidence would vote to convict Carriger beyond a reasonable doubt" (Appendix A at 36). (B.I.O. at 10–11) To be sure, the majority paid lip service to the *Schlup* standard, but, as detailed in the petition for writ of certiorari, the majority clearly *applied* a *Strickland* "confidence in the verdict" type standard. (P.W.C. at 21–23)

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5. Appendices A through H were submitted along with Petitioners' petition for writ of certiorari. Appendices I and J are appended to this reply brief.

Carriger does not take issue with Petitioners' assertion that the majority simply ignored the reliability requirement of *Schlup*. (See P.W.C. at 14–16) Nor could he. Carriger himself asserts that Dunbar "is a pathological liar." (B.I.O. at 17) Thus, he would be hard pressed to claim that Dunbar's subsequently repudiated recantation is the type of "new *reliable* evidence" necessary to unlock the *Schlup* gateway. *Schlup*, 513 U.S. at 324 (emphasis added). Nor does Carriger take issue with Petitioners' assertion that recanted testimony is inherently *unreliable*. (P.W.C. at 15) Thus, Carriger effectively concedes that the majority below misapplied the *Schlup* standard by omitting its essential element—"reliability."

Regarding the "new reliable evidence" that clearly establishes his guilt (P.W.C. at 16–20), Carriger asserts that the majority "did consider that proffer" but gave it "little weight." (B.I.O. at 19) However, as previously pointed out by Petitioners, the majority mentioned the reconstruction of the tape *only* in the context of shooting down Judge Ryan's credibility finding (Appendix A at 26–27), but did *not* even discuss this highly probative evidence in conducting its *Schlup* analysis (*id.* at 34–37). (P.W.C. at 18)

Carriger states that one of the reasons the majority gave this new reliable evidence "little weight" is because Carriger was unable to "examine" the reconstructed tape. What Carriger fails to mention is that he could not run away from the evidence fast enough when the State presented the criminalist's testimony at the 1987 post-conviction relief hearing. (See Appendix C at 29; Appendix H at 3, 31–32) During the third state post-conviction relief proceeding, Carriger filed an improper *ex parte* motion to have the tape released for examination and the motion was denied because *ex parte* proceedings are not authorized under Arizona law. (Appendix J) Carriger then abandoned the request. Carriger did not request release of the tape again until *after* he filed his successive petition for writ of habeas corpus and Petitioners had answered the petition. (See Appendix C at 26) Petitioners argued, and the district court found, that Carriger had procedurally defaulted on any challenge to the reconstruction of the tape by failing to pursue the issue in state court. (*Id.* at 29.)

Carriger asserts that "another reason" the majority gave the reconstruction of the tape evidence "little weight" was because of an alleged "inconsistency of the expert's testimony as to the location of the latent to the end of the roll of tape." (B.I.O. at 20) However, as pointed out in detail in the petition for writ of certiorari, the criminalist unequivocally testified that Carriger's fingerprint was located "Approximately 21 and a half inches" from the "end of the roll of tape"

(Appendix H at 30). (P.W.C. at 19) The majority's confusion does not change the testimony.[6]

In short, the majority simply ignored the *Schlup* "reliability" requirement in accepting and relying upon Dunbar's repudiated recantation, then turned its back on extremely probative reliable evidence that establishes Carriger's guilt. This is contrary to the very basis upon which this Court decided *Schlup*.

Finally, Carriger implicitly acknowledges that it is an open question whether a *Schlup* showing of "actual innocence" must be linked to a constitutional violation, but claims that "the state's withholding of critical exculpatory and impeachment evidence is intricately tied to his miscarriage of justice evidence." (B.I.O. at 21-22) This is not true. Dunbar's recantation of his trial testimony, and his short-lived claim that he and his ex-wife committed the crimes, has nothing to do with the majority's finding of a *Brady* violation relating to the alleged failure to obtain and disclose to the defense potential impeachment evidence. There has been no allegation, or finding, that the State knowingly presented perjured testimony. Clearly, the majority's (erroneous) *Schlup* finding is not linked to a federal constitutional claim. *See O'Dell v. Netherland*, 95 F.3d 1214, 1246 n.26 (4th Cir. 1996).

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6. Carriger maintains that the State's expert at trial "stated that he could not determine the location of the latent on the roll of tape." (B.I.O. at 19 n.16) That was because the expert that testified at trial was merely a fingerprint technician and was *not* asked to attempt to reconstruct the tape or otherwise determine where the print had been located in relation to the end of the roll of tape. When, during the second post-conviction relief proceeding, Carriger indicated that he intended to challenge the identification of the print, the State asked a criminalist if he could determine the location of the print in relation to the end of the roll of tape and he did so. (Appendix H at 2-3, 24)

III

BRADY DOES NOT REQUIRE THE PROSECUTION TO OBTAIN AND REVIEW POTENTIAL IMPEACHMENT MATERIAL IN THE POSSESSION OF GOVERNMENT AGENCIES NOT INVOLVED IN THE INVESTIGATION OR PROSECUTION OF THE CASE, ESPECIALLY WHERE THE DEFENSE HAS KNOWLEDGE OF THE MATERIAL AND FAILS TO REQUEST IT.

Carriger takes the position that *Brady* and its progeny require that the prosecution obtain, review, and hand over to the defense any "state records" that might contain potentially exculpatory or impeachment material, even if the state records are in the possession of an agency not involved in the investigation or prosecution of the case *and* even though the defense has *actual knowledge* of the material but fails to request the material. (B.I.O. at 24–25) Carriger's assertion conflicts with this Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), limiting the prosecutor's duty to *Brady* material "known to others acting on the government's *behalf in the case*, including the police." It also directly conflicts with the Seventh Circuit decision in *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996), holding that *Kyles* does *not* impose "a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."

Carriger cites to four cases he claims support the absurd proposition that the prosecution must locate and scour through any government records or files that may contain *Brady* material, regardless of whether the government agency is involved in the investigation or prosecution of the case. (B.I.O. at 24–25) None of those cases even arguably support any such duty. *United States v. Strifler*, 851 F.2d 1197, 1201–02 (9th Cir. 1988) deals with a *trial judge's* review of a witness' probation file for potential *Brady* material; it has nothing to do with imposing upon the prosecution a duty to seek out potential *Brady* material from government agencies. In *Martinez v. Wainwright*, 621 F.2d 184, 186–88 (5th Cir. 1980), a witness' "rap sheet" was in the possession of "the medical examiner's office" *and* an "assistant medical examiner testified for the prosecution at trial." Thus, the medical examiner was, most certainly, involved in the investigation *and* prosecution of the case. In *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973), the federal government prosecuted two defendants for bribing a *postal office employee*, but refused, *upon defendants' request*, to produce the employee's personnel file. The

district court refused to order the federal government to obtain the personnel file from the post office, and the circuit court remanded with directions that the district court obtain and review the personnel file and determine whether it contained *Brady* material. *Id*. Finally, in *United States v. Burnside*, 824 F. Supp. 1215, 1252–54 (N.D. Ill. 1993), the "lead prosecutor," other "personnel" in the United States Attorney's Office, officers and agents involved in the investigation, *and* "the Warden and other personnel in [a prison]" *all* had actual knowledge that government inmate witnesses were "using illegal drugs" and did not disclose such information to the defense. The court noted, parenthetically, that, even if none of the prosecutors, federal agents, or police officers knew of the witness' drug use, knowledge by the prison warden and other prison personnel would be "attributed to the government" because they worked closely with the United States Attorney's Office on the case. *Id*. at 1254.

Thus, neither Petitioners nor Carriger have located a single case supporting the unprecedented duty the majority has placed on the prosecution. *Brady* and *Kyles* do not place any sort of duty on a prosecutor to ferret out and scour through files or records of a "government agency", not involved in the investigation or prosecution of the case, in search of potential exculpatory or impeachment material. But that is precisely what the Ninth Circuit has done.

Carriger claims that Petitioners have taken a "reversal of the position" taken in 1982 in state court where the State of Arizona argued that Carriger's trial counsel were not ineffective in failing to obtain Dunbar's DOC file because a state statute and state court of appeals opinion (a civil case) prohibited inmates or the public from obtaining an inmate's DOC file. (B.I.O. at 25) However, the State was not successful in that argument, because the Arizona Supreme Court held that a defendant's right to confront witnesses trumped the statute. *State v. Morales*, 630 P.2d 1015, 1017–18 (1981). Moreover, even if the State had been correct, nothing prevented Carriger or his counsel from *requesting* that the prosecution attempt to obtain Dunbar's DOC file, or *requesting* that the trial court order its production.

Regarding Carriger's assertion that his trial counsel did not know that Dunbar had been an informant, that is simply not true. In a letter to trial counsel, Carriger wrote, "Bobby Dunbar was the informant for the state against John Douglas Troutmon for a safe burglary of the National Cash Register Company (about 1968 I think)." (Appendix B at 22) Thus, Carriger and his counsel knew full well that there was a DOC file on

Dunbar *and* that he had been an informant. They simply failed to obtain, or even request, Dunbar's DOC file.[7]

As pointed out in the petition for writ of certiorari, every other circuit to address the issue has held that where the defense has knowledge of the existence of potential exculpatory or impeachment material and fails to take steps to obtain it, *Brady* is not violated. (P.W.C. at 26) Again, the Ninth Circuit stands as a minority of one in holding otherwise.[8]

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7. The Arizona Supreme Court, after finding that Carriger had procedurally defaulted on the claim, alternatively found that trial counsel were not ineffective in failing to request or obtain Dunbar's DOC file because "it is doubtful it would have altered the result" of the trial. *State v. Carriger*, 692 P.2d 991, 1002 (1984) It noted that most of the information in the file would *not* even be admissible under the Arizona Rules of Evidence to impeach Dunbar. *Id.* at 1000–02. The en banc majority did not concern itself with the threshold question of admissibiity, relying instead upon a quotation from the sole *dissenting* Arizona Supreme Court justice and stating "Dunbar's file need not have been independently admissible to have been material." (Appendix A, at 40–41, 43)

8. Carriger asserts that he also "raised" the claim "that his counsel was ineffective for failing to discover and obtain Dunbar's prison files," and that the majority did not reach this claim because it granted relief on the *Brady* issue. (B.I.O. at 10 n. 3, 29) However, Carriger did *not* raise the claim that trial counsel was ineffective in not obtaining Dunbar's DOC file in his successive habeas petition. Rather, he had raised *that* claim in his first habeas petition and it was found to be procedurally defaulted. *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) Counsel for Petitioners pointed this out to be en banc court at oral argument. (Appendix I at 3–4) Thus, the en banc court had no jurisdiction to review the claim that trial counsel was ineffective in failing to request or obtain Dunbar's DOC file. *See Cacoperdo. v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Morgan v. Bunnell*, 24 F.3d 49, 52 (9th Cir. 1994)

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

* Excerpts from Oral Argument Before the En Banc Court
March 27, 1997, San Francisco, California

(Tape Counter 109–150)

COURT: What do we do with the state court's, you know the state court listened to this man on the recantation and the unrecantation and said his recantation is not credible, I don't believe it. What do we do with that, we're not sitting *de novo*.

MS. YOUNG: No, that's true, and it typically would be entitled to a presumption of correctness if it was supported by the record. The one thing you do need to know about the state court judge who was hearing this case is that he was not the trial judge, he was not the sentencing judge, so he had nothing to compare it with. He didn't sit at the trial and hear the State stand up and tell the jury that Robert Dunbar may be a burglar, but he is not a liar.

COURT: Is that required under the law?

MS. YOUNG: No, it's not, but I don't think he was in the best, I don't think he was in the best—

COURT: You know, the reason I asked you if that was your best argument, it seemed, you're arguing this case, but it seems to me that you would, even reading the panel's decision, see that there was something that concerned the panel. You said in your opening, and I thought you would start with that as your strongest point, had the Government represented Dunbar to be non-violent, truthful, and truthful?

MS. YOUNG: Did he, did the Government—

COURT: I said, had the Government represented that he was?

MS. YOUNG: Yes, yes.

COURT: Was he?

MS. YOUNG: No, we know he wasn't truthful and we know he was violent, we know he lied to the jury. And then you have to look at this case and realize that the common denominator—

COURT: Maybe your best argument will start something along that line and you would go into it so that when the Government comes up it would rebut it, but you argue the case as you want to argue it and if you want to start saying that the standard's wrong—by any standard there was evidence from which a trier of fact could find that Carriger was guilty, would you agree with that? By any standard?

MS. YOUNG: That by any standard the—

COURT: Was there evidence from which a trier of fact could find that Carriger was guilty?

MS. YOUNG: No there wasn't. When you look at the way our law defines innocence, and our law—

COURT: The caveat though when you answer that way, the caveat is: Not if Dunbar recants his testimony. Don't you have to add that before you say what you just said?

MS. YOUNG: Do we need the fact that he took the stand and said I lied at trial? Yes, I think that's critical.

COURT: Do we have to believe him? We have to believe him when he says that.

MS. YOUNG: Well, that, you don't have to believe him because what you have to know is that this man lies under

oath. We also know he has a history of framing other people and reporting those crimes.

COURT: But the superior court found that the time he lied under oath was when he recanted.

MS. YOUNG: That is what the superior court found and, again, that's entitled to a presumption of correctness, the panel gave it a presumption of correctness, I believe wrongly so. I think there was sufficient evidence to show that, that, you couldn't tell, actually. I don't think you can decide, when does Dunbar tell the truth? But what the panel—

COURT: On paper maybe, but none of us were there looking this man in the eye as he recanted and unrecanted, so what do we do?

MS. YOUNG: Well, what the panel did with that is said, o.k., we will give that the presumption of correctness, but, what flows from that is that Robert Dunbar is unreliable and we can't trust his testimony.

. . .

(Tape Counter 941-963)

MR. MAZIARZ: . . . And one last thing I would like to point out in reference to Judge Reinhardt's question of counsel. There is no claim of ineffective assistance of trial counsel before this court, that was not raised in this successive petition. That was raised in the petition several years ago and was found procedurally barred and was not raised in this petition. The only claims of ineffectiveness—

COURT: Why should it be raised in this petition? It was raised and we said it was procedurally barred. Now, if we decide that is no longer true, why aren't we free to consider it, it was raised before the last en banc court, the last en banc court said we can't consider it because

it's procedurally barred, so why shouldn't we be able to consider it?

MR. MAZIARZ: Because this court's jurisdiction is limited to claims raised in the petition before the district court and that claim was never raised as an independent substantive claim, with the allegation now that now we have cause to get to that abusive or procedurally barred claim. And to claim that counsel was ineffective in not raising it, we know under Coleman just doesn't get there.

COURT: You wouldn't very well expect them to raise it in their third petition when it's been rejected by this court in the second petition, would you?

MR. MAZIARZ: No. I wouldn't, but—

COURT: It would become futile.

MR. MAZIARZ: Right, but, again the court doesn't have jurisdiction to review that substantive claim regardless of any showing of cause and prejudice—

COURT: So, under your theory the petitioner is required to re-raise issues in subsequent petitions if he wishes to preserve the possibility that the court might be willing to reconsider?

MR. MAZIARZ: If he is going to allege cause and prejudice to get to that barred claim, yes.

APPENDIX J

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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JAN 18'94	JAN 19 '94
Clerk of the Court	Distr. Clr.

CLERK OF THE COURT

Jan 14, 1994 HON. MICHAEL D. RYAN S. Cummings
Deputy

No. CR 101609

STATE OF ARIZONA

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Florence, AZ. 85232

Appeals

The court reviewed the State's Motion for Order Prohibiting Ex Parte Proceedings. Petitioner's response, and the State's reply were received also. The pleadings were considered along with the files.

Petitioner filed a number of **ex parte** motions requesting orders for release of exhibits, unsealing of documents, etc. Pursuant to the **Arizona Supreme Court's** recent ruling in **State v. Apelt, -Ariz.-, 861 P.2d 634(1993),** the State requests an order prohibiting such motions. The State's request is well-taken. **Apelt, supra,** prohibits such procedures. The reasoning for this prohibition is sound and the federal and other authority

cited by Petitioner are not germane. **Ex parte** Motions are particularly inappropriate in **Rule 32** proceedings. Therefore,

IT IS ORDERED granting the State's Motion for Order Prohibiting **Ex Parte** Proceedings.